No. 5636

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CARRIE GAUNT, as Executrix of the Estate of RUBY M. GAUNT, Deceased,

Appellant,

vs.

VANCE LUMBER COMPANY, a corporation,

Appellee.

Appellee's Answer Brief

Appeal from the United States District Court for the Western District of Washington, Northern Division.

HON. JEREMIAH NETERER, *Judge*

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APPELLEE'S STATEMENT OF THE CASE

The suit was brought by R. M. Gaunt to reform, and enforce, a broker's contract for commission for sale of lands and personal property for a single, undivided consideration. Judge Neterer tried the case below and decided that there was no mistake, nor fraud; that the minds of the parties never met as to the identity of the property to be sold; that equity would not construct a contract for the parties; that the contract was void under the Washington statute of frauds; that it could not be reformed upon parol testimony, and that another agent made the sale.

By falsely representing that she had a buyer who was represented by one Wilson, Gaunt obtained a letter promising her a commission of two per cent if she made a sale. Wilson did not represent a purchaser, but was a broker associated with Gaunt. Wilson testified he was to have 10% of the commission. (Tr. 64.)

Undisputed testimony by Dollar shows this false representation. (Tr. 60.) It is supported by Gaunt's letter to Dollar, Defendant's Ex. A-4 (Tr. 132), where she said "Then Mr. Wilson can submit it to his people and take them to see the property."

Induced by this pretext, the letter on which suit is based, was written July 5, 1923. It does not describe the lands at all. The letter is Exhibit 1. (Tr. 85-6.)

August 9th, 1923 (Plaintiff's Ex. 9, Tr. 122), Miss Gaunt wrote Vance Lumber Company:

> "I have this day submitted your timber and mill property at Malone, to **Mark E. Reed of the Simpson Logging Company,** and **his associates,** for their consideration.
>
> "He wrote me that they would give this proposition their consideration if I would send plat and data which you gave to me. Owing to the financial responsibility of these parties whom I know are amply able to handle a property like yours, I trust this will meet with your approval——"

The liability to pay commission is predicated on this submission of a plat to Mark E. Reed of Simpson Logging Company. Reed submitted the plat to Mason County Logging Company, who was not interested therein, because it already had the information, and was dealing to buy the property through another agent, W. H. Abel. Vance Lumber Company was never informed that Reed submitted the plat to Mason County Logging Company.

This appellee introduced the testimony of J. A. Vance and H. B. Dollar that Vance Lumber Company was dealing to sell the property to Mason County Logging Company before and during the whole period that Gaunt was trying to sell it to another; that maps and data had been furnished to the president and manager of Mason County Logging Company; the deposition of Thomas Bordeaux, president, and C. R. Bordeaux, manager of Mason County Logging Company, showed that their company was dealing to buy the property, not through Gaunt, but through W. H. Abel; that they never met Gaunt, knew nothing about her, did not become interested in the property through her. The deposition of Thomas Bordeaux contains all the correspondence on the subject, including letters written before Gaunt was employed as broker.

The appellant had no witnesses to establish mistake, except Vance and Dollar, who denied there was

any mistake. Appellant relies on cases of reformation of deeds, or executory contracts of sale, where, by mutual mistake, lands were erroneously described; the erroneous description being complete in itself. Here we are dealing with a contract which never was complete.

Under a different statute of frauds, it is the rule in the State of Washington that part performance may be shown in aid of a parol contract sought to be specifically enforced, but that rule has been expressly held not to apply to cases under Rem. Comp. St., section 5825, which includes brokers' contracts for commissions.

Am. Mer. Marine Ins. Co. v. Tremaine, 269 Fed 376, arose under the insurance code of Washington, and it was held that the statute did not prevent reformation for mistake. No question of statute of frauds ~~is~~ was there involved. The decision by Judge Neterer in the lower court found against appellant on the facts and on every question of law raised. The decree appealed from is supported by the clear weight of all the testimony. Indeed there are no disputed questions of fact.

AUTHORITIES

I. Equity will not enforce a contract obtained by fraud, subterfuge or imposition.

Pope Mfg. Co. v. Gormully, 144 U. S. 238;

Cathcart v. Robinson, 5 Pet. 264;

Grieson v. Winey, 240 Fed. 691 (8 C. C. A.);

Pomeroy, Spec. Performance (3rd ed.), Sec. 183.

II. Equity will not make contracts for parties; nor supply essential missing terms; incomplete contracts are not specifically enforceable.

N. W. L. Co. v. Ry. Co., 221 Fed. 807;

Hackley v. Oakford, 98 Fed. 781 (3rd C. C. A.);

Pomeroy, Spec. Per. (3rd ed.), Sec. 145.

III. In order that a writing by relation may be used in aid of a contract required by the statute of frauds to be in writing, the relation or connection must appear on their face. There must be either an express reference to each other or internal evidence of their unity, relation or connection.

Broadway v. Decker, 47 Wash. 586;

Gilman v. Brunton, 94 Wash. 5;

Nance v. Valentine, 99 Wash. 325;

12 Enc. Ev. 18;

27 C. J. 262.

IV. The jurisdiction of the federal courts in equity are not impaired by state statutes which create substantive rights.

Brine v. Hartford F. Ins., 96 U. S. 627;

Union National Bank v. Bank, 136 U. S. 223;
1 Pomeroy, Eq. Jur. (4th ed.), Sec. 299.

V. Federal courts of equity give effect to state statutes of fraud, as construed by the highest courts of the several states.

Brashear v. West, 7 Pet. 608;
Lloyd v. Fulton, 91 U. S. 487;
Massey v. Allen, 17 Wall. 354;
Robinson v. Belt, 187 U. S. 43;
Andrews v. Youngstown, 39 Fed. 353;
Walker v. Hafer, 170 Fed. 37 (6 C. C. A.);
Beckwith v. Clark, 188 Fed. 171 (8 C. C. A.).

VI. Federal equity courts follow the law, and will not enforce void contracts.

Hedges v. Dixon, 150 U. S. 182;
Magniac v. Thomson, 15 How. 282;
West v. Camden, 135 U. S. 507;
Clark v. Smith, 13 Pet. 195;
East Central v. Central Eureka, 204 U. S. 266;
In re Pacific El. & Auto Co., 224 Fed. 220.

VII. State equity courts follow the law and will not enforce void contracts.

Reed v. Johnson, 27 Wash. 42;
Cascade v. Railsback, 59 Wash. 379;
Delbridge v. Beach, 66 Wash. 416.

VIII. The Washington statute, Rem. Comp. St., Sec. 5825, subd. 5, makes void a broker's contract to buy or sell land which is not in writing, and signed by the party to be charged therewith, or his agent duly authorized. The entire statute reads (italics ours):

> "In the following cases, specified in this section, any agreement, **contract** and promise **shall be void,** unless such agreement, **contract** or promise, or some note or memorandum thereof, **be in writing,** and **signed** by the **party to be charged therewith,** or by some person thereunto by him lawfully authorized, that is to say: (1) Every agreement that by its terms is not to be performed in one year from the making thereof; (2) Every special promise to answer for the debt, default, or misdoings of another person; (3) Every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry; (4) Every special promise made by an executor or administrator to answer damages out of his own estate; (5) **An agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission.**"

IX. A broker's contract to sell lands and personal property, which fails to sufficiently describe the lands, is entirely void.

> Thompson v. English, 76 Wash. 23;
>
> Cushing v. Monarch Timber Co., 75 Wash. 684;
>
> Rogers v. Lippy, 99 Wash. 312;
>
> Big Four Land Co. v. Daracunas, 111 Wash. 224;

Goodrich v. Rogers, 75 Wash. 212;

Baylor v. Tolliver, 81 Wash. 257;

White v. Panama Lumber Co., 129 Wash. 189;

Nance v. Valentine, 99 Wash. 323;

Engleson v. Port Crescent Shingle Co., 74 Wash. 424;

Black v. Milliken, 143 Wash. 204;

Farley v. Fair, 144 Wash. 101;

Campbell v. Weston, 87 Wash. 73;

Coleman v. St. Paul, 110 Wash. 273.

X. A contract, insufficient under the statute of frauds, will not be reformed upon parol testimony.

Mead v. White, 53 Wash. 638;

McCrae v. Ogden, 54 Wash. 521;

2 Story, Eq. Jur. (13th ed.), Sec. 770-a.

XI. Part performance or full performance will not aid a broker's contract for commission, void under the statute of frauds.

Keith v. Smith, 46 Wash. 131;

Cushing v. Monarch Timber Co., 75 Wash. 687;

Thill v. Johnson, 60 Wash. 393.

XII. In order to entitle a broker to a commission, he must be the procuring cause of the sale.

Frink v. Gilbert, 53 Wash. 392;

Bagley v. Foley, 82 Wash. 222;

Dore v. Jones, 70 Wash. 157;
Bleiweiss v. McCurdy, 106 Wash. 419;
Fawkner v. Rio Negro, 104 Wash. 571;
Dwyer v. Raborn, 6 Wash. 213;
Jones v. Eilenfedt, 28 Wash. 687;
Neeley v. Lewis, 38 Wash. 20;
Blackwood v. Ballard, 83 Wash. 405;
Hayden v. Ashley, 86 Wash. 653;
Antill v. Lorah, 118 Wash. 680.

XIII. A broker does not earn a commission where the principal makes a sale himself.

Sunnyside v. Bernier, 119 Wash. 386;
Hammond v. Mau, 69 Wash. 204;
Elson v. Sanders, 121 Wash. 391;
Fawkner v. Rio Negro, 104 Wash. 57;
Taylor v. Maddux, 4 F. 2d 447.

GAUNT NOT PROCURING CAUSE

That Miss Gaunt did not aid in making the sale is clearly established. All she did was to mail to Mark E. Reed, of Simpson Logging Company, an incomplete plat partly describing the lands. There is nothing to show that she knew Reed was trustee of Mason County Logging Company, and Reed did not inform her that he sent the plat to Mason County Logging Company nor was Vance Lumber Company so informed.

Long before the plat was sent to Reed, or by him to Mason County Logging Company, negotiations had been started and were pending to sell the property to Mason County Logging Company. W. H. Abel who was attorney for both companies was actively engaged in carrying on these negotiations and, as Judge Neterer decided, made the sale and received a commission for doing so. Abel had furnished maps and data before Miss Gaunt sent the plat to Reed, and the parties were dealing every few days. The chain of correspondence is in the deposition of Thomas Bordeaux, which by order of Judge Neterer, was included as an exhibit. These letters show a continuous negotiation dating from before Gaunt had anything to do with the transaction, and continuing to a sale months later. These letters are:

Feb. 7, 1922. Abel to Thomas Bordeaux.

Feb. 16, 1922. Mason County Log. Co. to Abel (asking for list of property, number of acres, standing timber, description, etc.).

Mar. 23, 1922. Abel to Mason County Log. Co.

June 20, 1923. Abel to Thomas Bordeaux (about meeting).

June 21, 1923. Thomas Bordeaux to Abel (about meeting next week).

July 17, 1923. Abel to Bordeaux (about price).

July 18, 1923. Bordeaux to Abel (asking for maps).

Aug. 27, 1923. Option given.

Sept. 18, 1923. Mason County Log. Co. to Abel (showing it had started to examine property).

Sept. 21, 1923. Mason County Log. Co. to Abel (discussing properties and price).

Sept. 22, 1923. Abel to Bordeaux (about meeting).

Oct. 4, 1923. Mason County Log. Co. to Abel (discussing price).

Oct. 4, 1923. Abel to Mason County Log. Co. (submitting manufacturing report and sales report).

Oct. 6, 1923. Mason County Log. Co. to Abel (discussing price and asking reduction).

Oct. 18, 1923. Vance Lumber Co. to Mason County Log. Co. (extending option for 30 days).

Oct. 19, 1923. Mason County Log. Co. to Vance (discussing price, terms and title).

Oct. 26, 1923. Bordeaux to Abel (discussing price and other property).

Oct. 30, 1923. Mason County Log. Co. to Vance (gives notice sending cruisers).

Nov. 3, 1923. Mason County Log. Co. to Abel (notice regarding cruisers asking extension to Jan. 1).

Thomas Bordeaux testified that W. H. Abel interested Mason County Logging Co. in the property; that nobody else interested it. They had been having conversation with Abel on the subject for about two years or more before the deal was closed; that Mason County Logging Co. was not acquainted with R. M. Gaunt; had no correspondence or dealings with her; did not know she had the properties for sale and did not deal with any other person except Abel, Vance and Dollar. During the entire time, Abel was attorney for Vance Lumber Company and Mason County Logging Company.

On cross-examination, Thomas Bordeaux testified that the only stockholders of Mason County Logging Company were himself, his brother and Mrs. A. H. Anderson, of Seattle. (Dep. 36.) Mark E. Reed, of Shelton, was acting as trustee for Mrs. Anderson. (Dep. 36.) He discussed the matter with Reed, who was always opposed to buying the Vance holdings because Vance wanted too much money. (Dep. 36-7.) He first talked with Reed on the subject about the first of the year 1924. (Dep. 37.) He did not remember receiving a plat from Reed, but did remember seeing it in the office. (Dep. 38-9.) It was not necessary to get Reed's consent to buy the property. (Dep. 48.) Thomas Bordeaux is the active manager of Mason County Logging Company. (Dep. 51.)

C. R. BORDEAUX, the manager of Mason County Logging Company, testified:

We never heard of Miss Ruby M. Gaunt in connection with finding the Mason County Logging Company as a buyer of this property, and never met the lady (Tr. 79). While Reed was a director of Mason County Logging Company, he was never called in except when it came to the matter of final negotiation (Tr. 79-80). When the plat came in from Mr. Reed we were already dealing with Mr. Abel and no attention was given to it as it furnished no information that we did not already have. We had the information from the Vance Lumber Company a long time before the receipt of that plat, as to their being willing to sell their properties (Tr. 80).

Miss Gaunt did not earn a commission by submitting a plat to Reed for him to submit to **unknown** associates.

The testimony of J. A. Vance and H. B. Dollar also shows that Miss Gaunt had nothing to do with the sale to Mason County Logging Co. They did not know her in the negotiations at all, and all negotiations were carried on by W. H. Abel. None of this testimony is denied and the only fact on which a claim of commission is based is that a plat was mailed to Reed, of Simpson Logging Company, and that Reed mailed this plat to Mason County Logging Company. However, it is undisputed that Mason County Logging Co. was not interested in the plat.

It already had the information and the plat did not aid nor induce the sale made by Abel the following January.

A broker employed to sell lands is not entitled to a commission unless he procures a purchaser. This Miss Gaunt did not do. Judge Neterer decided that the sale was made through W. H. Abel (Tr. 36, 71).

A principal may make a sale himself, and broker's contract is not violated thereby. Sunnyside v. Bernier, 119 Wash. 386. Nor does an exclusive broker's contract prevent sale by the owner without liability for commission. Hammond v. Mau, 69 Wash. 204; Elsom v. Sanders, 121 Wash. 391; Fawkner v. Rio Negro, 104 Wash. 571.

The sale was consummated through another agent and there was no liability for commission. Taylor v. Maddux, 4 F. (2d) 447. Nor is a broker entitled to a commission when he does not disclose the purchaser's identity. Penter v. Straight, 1 Wash. 365.

MISTAKE

The letter on which the suit is based, described no lands at all. The plat sent with the letter was unsigned. Certain squares of the plat were colored. On the margin of the plat, unsigned, was the following:

> "Also lands in Section 10, 16, 17, in Township 17 North, Range 5 West on which the mill buildings or other buildings are located."

There is here an entire lack of description of any particular lands.

The omission was intentional and there is no testimony showing a mistake, mutual or otherwise. The only testimony on the subject came from Vance (Tr. 69-70) and Dollar (Tr. 59), each of whom were placed on the stand by plaintiff. Miss Gaunt died after suit was brought and her testimony was not available, except that given in the law action in the state court, where no claim of mistake had been made. There is no proof that all these lands later sold were originally intended to be sold at the time that Miss Gaunt was employed as broker.

The parties had never orally discussed or agreed on the identity of the property to be sold. The testimony of Vance (Tr. 69-70), Dollar (Tr. 59) and Abel (Tr. 74-75) shows that months later, in order to make a sale to Mason County Logging Company, it was decided to sell the farm, the lumber yard at Elma, the cleared lands and the logged-off lands. In drafting the complaint, the description contained in the contract of sale, including these lands, was copied, and there was alleged and imputed to Vance Lumber Company a previous intention to sell all of these lands. These allegations were not supported by proof, and the trial court held the minds of the parties had never met upon the subject-matter of the property to be sold.

1 Story, Eq. Jur. (13th ed.), sec. 177, under "Mistake," as applied to the reformation of powers, col-

lects the English cases which shows that a court of equity is powerless to supply terms to an instrument otherwise void; the effect would be to defeat the very policy of the legislative enactment. Story states:

> "And indeed it may be stated as generally although not universally true, that the remedial power of courts of equity does not extend to the supplying of any circumstance for the want of which the Legislature has declared the instrument void; for otherwise equity would in effect defeat the very policy of the legislative enactments." (Citing many English cases.)

Pomeroy, Eq. Jur., Sec. 867 (4th ed.) states:

> "That the courts of some states have refused to apply the doctrine of parol variation on behalf of the plaintiff to written instruments within the statute of frauds, when the modification will enlarge the scope of the instrument so that it should include subject-matter not embraced within it as it stands, or would increase the estate, or would otherwise cause it to operate upon interests which were not originally contained within its terms. The leading case is Glass v. Hulbert, 102 Mass. 24."

COURTS OF EQUITY APPLY LOCAL STATUTES

It is well settled that federal courts of equity, in cases involving questions of local law, follow the state statute. Thus, this court in Old Colony Trust Co. v. Tacoma, 230 Fed. 389, said, speaking by Gilbert, J.:

> "While the third question did not depend up-

on the construction of a state statute, it involved the application of principles of law to local conditions, and the ruling of the state court should be controlling in a federal court."

The supreme court in Hedges v. Dixon County, 150 U. S. 182, said:

> "Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law, and where the transaction or the contract is declared void, because not in compliance with express statutory or constitutional provisions, a court of equity cannot interpose to give validity to such transaction or contract, or any part thereof."

In Magniac v. Thomson, 56 U. S. 282, it was said:

> "Wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation. but in all such instances the maxim **'Aequitas sequitus legem"** is strictly applicable."

In the following suits in equity in federal courts, the court has applied, and considered itself bound by, the state statute of frauds, and state decisions based on it:

Brashear v. West, 7 Pet. 608;
Lloyd v. Fulton, 91 U. S. 487;
Massey v. Allen, 17 Wall. 354;
Andrews v. Youngstown, 39 Fed. 353;
Beckwith v. Clark, 188 Fed. 171 (8 C. C. A.).

Brashear v. West, 7 Pet. 608, a suit in equity, in which the local statute of frauds was given effect. The case involved the validity of a deed of assignment, a question of substantive right. The court said:

> "The construction which the courts of that state have put on the Pennsylvania statute of frauds must be received in the courts of the United States."
>
> "In Lippincott and Annesly v. Barker (2 Binney, 174) this question arose, and was decided after elaborate argument in favor of the validity of the deed. This decision was made in 1809, and has, we understand, been considered ever since as settled law."
>
> "In Pierpont and Lord v. Graham (4 Wash. Rep. 232) the same question was made, and was decided by Judge Washington in favor of the validity of the deed. This decision was made in 1816. We are informed of no contrary decision in the State of Pennsylvania, and must consider it as the settled construction of their statute."

Lloyd v. Fulton, 91 U. S. 487, was a suit in equity, arising in a state where the English statute of frauds touching promises made in consideration of marriage, is in force, and a verbal promise of the husband to settle property on his wife made before the marriage is void. The court gave effect to the statute and held the contract to be void.

Massey v. Allen, 17 Wall. 354, was a petition of an assignee in bankruptcy to set aside a bill of sale of

household furniture. The opinion is by Justice Field, and he applied the statute of frauds of Missouri and said:

> "The statute being a local one applying only to sales in Missouri, this court will follow the construction given to it by the highest court of the state."

Andrews v. Youngstown, supra, was a suit to reform a written instrument and for specific performance. The contract was void under the Pennsylvania statute of frauds. The court, in denying equitable relief, said:

> "Confessedly, then, there is here no contract which legally binds the defendant. But if there is no such valid contract at law, upon what principle can the plaintiff be granted the equitable relief here sought? Undoubtedly the above quoted statutory provision is as binding on a court of equity as on a court of law. Litchfield v. Ballou, 114 U. S. 190. Certainly the general rule is that courts of equity cannot dispense with regulations prescribed by a statute, or supply any circumstance for the want of which the statute has declared the instrument void. 1 Story, Eq. Jur. 96, 177."

Beckwith v. Clark, 188 Fed. 171 (8th C. C. A.) was a suit in equity for specific performance where the court, by Sanborn, J., said, in applying the Kansas statute of frauds:

> "Rules of property established by the construction of the highest judicial tribune of a state of its constitution or statutes prevail in the federal courts where no question of right under

the constitution or laws of the nation and no question of general or commercial law is involved."

CONTRACT IS VOID

Judge Neterer decided the contract to be void under Rem. Comp. St., section 5825, heretofore quoted, because it did not describe the property to be sold. The letter describes no lands at all. The imperfect description in the plat reads:

> "Also lands in Sections 10, 16, 17 in Township 17 N. R. 5 West on which the mill, mill buildings —and other buildings are located."

Thompson v. English, 76 Wash. 23, is in point. There the contract was held void under the statute of frauds, where the property was described as:

> "Seventy-nine acres in section 30, township 2 N., Range 3 E. W. M., Clarke Co., Wn. Owner, A. E. English."

The court said, as page 26:

> "It will be observed that this description does not specify which 79 acres in section 30 was intended. To ascertain this fact, resort must be had to oral testimony. The description given cannot be applied to any definite property. This question has recently been before the court in the case of Cushing v. Monarch Timber Co., 75 Wash. 678."

Keith v. Smith, 46 Wash. 131, action for broker's commission. It was said:

> "After placing the most liberal construction upon the note or memorandum pleaded by the appellants, we fail to see how it can be held a sufficient compliance with the statute. It does not purport to authorize or employ the plaintiffs to act as brokers. It describes no particular real estate. * * * The alleged memorandum is so signally indefinite in its terms that it utterly fails to amount to written evidence of an agreement authorizing or employing the appellants to purchase real estate for the respondents for a commission or compensation."

Farley v. Fair, 144 Wash. 101, action for broker's commission. The property was insufficiently described. The court said:

> "Our statute of frauds declares a public policy (Chamber v. Kirkpatrick, 142 Wash. 630), and we may not subordinate that which has been made a public policy of this state to the laws of some other jurisdiction."

In Grafton v. Cummings, 99 U. S. 122, the supreme court applied the statute of frauds of New Hampshire and said:

> "It is therefore an essential element of a contract in writing that it shall contain within itself a description of the thing sold, by which it can be known or identified——"

The supreme court of Washington has cited and applied the Grafton case in Swartswood v. Naslin, 57 Wash. 287 (op. by Rudkin, C. J.) where the memorandum of agreement for the employment of a broker to sell real estate was insufficient among oth-

er reasons because it did not describe the real estate, and in Cushing v. Monarch Timber Co., 75 Wash. 686, where the court said:

> "The description being essential, it follows that it must be such a description as would meet the requirements of a sufficient description under any phase of the statute of frauds, as, for instance, when invoked in actions for specific performance. It must be a description, complete within itself, by which the realty to be sold can be known and identified."

Other cases in which the description was insufficient and brokers' contracts held void, are:

White v. P. L. & S., 129 Wash. 189, "Shingle mill plant situated in the City of Olympia, Washington;" Salin v. Roy, 81 Wash. 261, "My timber and sawmill near Dupont, Washington;" Engleson v. P. C., 74 Wash. 424, "Shingle timber for sale in Clallam County, Washington;" Baylor v. Tolliver, 81 Wash. 257, "My property, including 121 acres of land near Ephrata, etc."; Rogers v. Lippy, 99 Wash. 312, "My stock ranch located in sections 9, 17 and 21, township 3 South, Range 13 East, Sweetgrass County, Montana;" Nance v. Valentine, 99 Wash. 323, "My property, the 667 acre hay ranch located near Cataldo, Idaho,"—are held to be insufficient descriptions to satisfy the statute.

Nor is a recovery upon **quantum meruit** allowed:

Keith v. Smith, 46 Wash. 131;

Briggs v. Bounds, 48 Wash. 579;

Cushing v. Monarch Timber Co., 75 Wash. 685;

Modern Irr. Land Co. v. Neely, 81 Wash. 39, 46.

JURISDICTION IN EQUITY

Appellant argues that to apply the state statute of frauds is to limit the jurisdiction of the trial court sitting in equity. The argument confuses procedural with substantive rights. The state statute of frauds deals with substantive rights, not with procedure or with remedies; it merely declares a broker's contract for commission to be void unless in writing.

For a federal court sitting in equity to reform a contract, which by the provisions of the state statute is a void contract, is to nullify the state statute. In such case the court in equity would give effect to that which the state law says no effect shall be given.

The appellant misconstrues the application of the statute of frauds. In no way does that statute restrict the jurisdiction of a federal court in equity in considering and deciding a question presented to it. Courts of equity, whether state or federal, follow the law. Indeed, that is one of the settled maxims of equity jurisprudence.

The leading case on the subject is Brine v. Hartford Fire Ins. Co., 96 U. S. 627, which involved the point whether a federal court in equity was bound

by the state redemption statute, or whether the federal equity practice applied. The opinion by Miller, Justice, said:

> "We are of the opinion that the propositions last mentioned are sound; and if they are in conflict with the general doctrine of the exemption from state control of the chancery practice of the federal courts, as regards mere modes of procedure, they are of paramount force, and the the latter must to that extent give way. It would seem that no argument is necessary to establish the proposition, that when substantial rights, resting upon a statute, which is clearly within the legislative power, come in conflict with mere forms and modes of procedure in the courts, the latter must give way and adapt themselves to the forms necessary to give effect to such rights. The flexibility of chancery methods, by which it moulds its decrees so as to give appropriate relief in all cases within its jurisdiction, enables it to do this without violence to principle. If one or the other must give way, good sence unhesitatingly requires that justice and positive rights, founded both on valid statutes and valid contracts, should not be sacrificed to mere questions of mode and form."

> "Let us see if the Statutes of Illinois on this subject do confer positive and substantial rights in this matter."

> "It is not denied that in suits for foreclosure in the courts of that State the right to redeem within twelve months after the sale under a decree of foreclosure is a valid right, and one which must govern those courts."

"Nor is it pretended that this court or any other federal court can, in such case, review a decree of the state court which gives the right to redeem. This is a clear recognition that nothing in that statute is in conflict with any law of the United States. If this be so, how can a court, whose functions rest solely in powers conferred by the United States, administer a different law which is in conflict with the right in question? To do so is at once to introduce into the jurisprudence of the State of Illinois the discordant elements of a substantive right which is protected in one set of courts and denied in the other, with no superior to decide which is right."

In Union National Bank v. Bank of Kansas City, 136 U. S. 237, where the trial court had dismisssed the bill in equity because the validity of a deed of trust was to be determined by the state statute and state decisions construing the statute, the court said:

"The determination of these questions is governed by the law of Missouri where the deed was made and the parties to it resided——"

"The question of the construction and effect of a statute of a state regulating assignments for the benefit of creditors, is a question upon which the decisions of the highest court of the state establishing a rule of property, are of controlling authority in the courts of the United States——"

"The interpretation within the jurisdiction of one state becomes a part of the law of that state as much so as if incorporated into the body of it by the legislature."

Pomeroy, Eq. Jur. (4th ed.), Sec. 299, reads:

> "While, therefore, it is correctly held that the equitable jurisdiction of the national courts, their power to entertain and decide equitable suits and to grant the remedies properly belonging to a court of equity, is wholly derived from the constitution and laws of the United States, and is utterly unabridged by any state legislation, yet, on the other hand, **the primary rights, interests and estates which are dealt with in such suits and are protected by such remedies are within the scope of state authority, and may be altered, enlarged or restricted by state laws.**"

A broker's contract for commissions for the sale of real estate is a rule of property and it has never been held that federal courts in equity will ignore and thus nullify the statute.

INDIVISIBLE CONSIDERATION

The letter on which suit is based stated an indivisible consideration of $3,250,000 for personal property and real property (Tr. 86). It has been decided often by the supreme court of Washington that where an indivisible consideration is stated, if the land is not described, the contract is void in its entirety.

Cushing v. Monarch Timber Co., 75 Wash. 684, considered this precise question. The court said:

> The sale, as we have seen, included timber, timber lands, and a railroad. There was no evidence of any segregation of the price paid for the timber from that paid for the other proper-

ty involved, nor was there any evidence that the parties to this action ever contemplated any such segregation. It is manifest that if there was any contract or agreement to pay a commission upon any sale, it was upon a sale of all of these properties. It is equally manifest that whatever the agreement, it rested, so far as the thing sold was concerned, wholly in parol. It is elementary that a contract part oral and part in writing is obnoxious to the statute."

In White v. Panama Lumber Co., 129 Wash. 189, on page 192, the court said:

"(2) He asserts that because most of the property he sold was personal property, he should, at least, be permitted to recover as to it. The contract, however, was indivisible, and since it is void as to the real estate it is void also as to the personal property. In Dutiel v. Mullens, 192 Ky. 616, 234 S. W. 192, a similar case, the court said:

" 'It is contended that the promise to pay the $1,000 evidenced by the check, being in part a promise to pay for land, it was not without consideration—in part at least—as the sale of personal property was not affected by the statute of frauds. The contract as alleged was an entire contract; that is, the land and personal property were sold by one and the same contract. The contract was entire and indivisible. There was no sum fixed as the price of the personalty, separately from the price of the land, so that the sale of one could be held valid and the other invalid. The contract for the sale of the land being indivisible, the contract for the sale of the personalty must also fail, as the two cannot be separated.' "

REFORMATION

Appellant's case depends upon her asserted right to reform by parol evidence a contract which is void under the state statute of frauds. This the state rule forbids.

Construing subdivision 2 of Section 5825 Rem. Comp. St. (the same statute of frauds), Mead v. White, 53 Wash. 638, denied reformation on parol testimony; to do so would void the statute of frauds and permit the contract to rest partly in writing, partly in parol. The court said:

> "Finally, it is contended that a court of equity has power to reform the contract and to enforce it when so reformed. The contract being invalid under the statute, parol evidence will not be admitted for the purpose of reforming it. To do so would result in permitting the parties to accomplish indirectly that which the statute forbids * * * The record does not present the question of reforming a contract so as to speak the truth, but rather of creating a contract in its entirety."

The statute was again applied in McCrea v. Ogden 54 Wash. 521, which involved the right of a broker to recover compensation under a broker's void contract. The court said:

> "But the purpose of the law was to remove all doubt, and in doing so no injustice was done the broker, for it is always within his power to make the contract or memorandum certain in every particular, including the party to be bound, which, notwithstanding the expression in the

former opinion to the contrary, we regard as the first essential of the law; which element, if proven in this case, would necessitate a resort to parol testimony. In Forland v. Boyum, 53 Wash. 421, following Foot v. Robbins, 50 Wash. 277, and Keith v. Smith, 46 Wash. 131, in construing this same statute, we held that the terms of the contract must appear from the writing itself, and that parol testimony could not be received to ascertain the amount agreed on as a commission. In Mead v. White, 53 Wash. 638, the court said, in construing a contract involving the principles here presented:

> " 'In order to hold the respondents to any liability, the court would be required to create a contract, either by construction or by parol evidence. There is no language in the contract to warrant the former, and the latter is within the prohibition of the statute.' "

It is conceded that equity will reform instruments for mutual mistake. But that does not mean that a court of equity will not follow the state statute of frauds. None of the cases relied on by the other side in support of their position involves the statute of frauds. It has never been the rule that a court of equity, under the guise of reforming the contract for mistake will add essential terms to the contract. That would be to construct a contract for the parties.

2 Story, Eq. Jur. (13th ed.), Section 770-a, Page 93, states:

> "In the case of a plaintiff seeking the specific performance of a contract, if it is reduced to

writing, courts of equity will not ordinarily entertain a bill to decree a specific performance thereof with variations or additions or new terms to be made and introduced into it by parol evidence; for in such a case the effect is to enforce a contract partly in writing and partly by parol; and courts of equity deem the writing to be higher proof of the real intentions of the parties than any parol proof can generally be, independently of the objection which arises in many cases under the statute of frauds."

PAROL EVIDENCE INADMISSIBLE

It is the settled rule in the State of Washington that a broker's contract, under the statute of frauds must be in writing which omits essential terms, such as the description of the property, may not be aided by parol testimony to establish any material element of the contract. The latest decision upon the subject of the supreme court of the State of Washington is Black v. Milliken, 143 Wash. 204. The court denied recovery and said:

> "The memorandum is not complete in itself, and resort must be made to other writings or oral testimony in order to determine the amount to be paid. This we have held in numerous actions of like character cannot be done—— The subject-matter of the sale upon which the commission is claimed is an essential part of the contract, and the writing evidencing the agreement must be such as to make it unnecessary to resort to parol evidence to establish any essential part of the agreement."

Without laboring the point, the supreme court of Washington has for many years consistently held that essential terms may not be supplied by parol testimony. A leading case upon the subject is Cushing v. Monarch Timber Company, 75 Wash. 678. Many other cases are cited in our list of authorities. The reasons for the rule are well stated in Allen v. Kitchen, an Idaho case reported in 100 Pac. 1052.

That is a leading case under the Idaho statute of frauds, requiring contracts for the sale of lands to be in writing, and holding that omitted essential terms may not be supplied by parol. It was said:

> "The question arises as to whether or not a contract of this kind within the statute of frauds (Section 6007 of the Revised Codes) can be so reformed by a court of equity as to make a good and complete description out of an insufficient and void description. It is not a question here of making a contract speak the truth which by its terms speaks untruthfully, or, in other words, of making a contract express the true intent of the contracting parties where in fact it expresses on its face something they did not intend or agree upon. There is no contention made here that the contract in any way speaks untruthfully. The complaint is that it does not speak the whole truth. This is the very thing the statute of frauds is enacted to guard against. It requires the contract to be in writing, and prohibits oral evidence to establish a contract of this kind. There is no contract until it is reduced to writing as provided by law. It is not a question as to what the contract was intended to be, but, rather, was it consummated

by being reduced to writing as prescribed by the statute of frauds. Admittedly an essential portion of the contract in this case was not reduced to writing and subscribed by the party to be bound. This case, therefore, presents the question of adding to and supplying an insufficient description, rather than that of reforming an untruthful description. If a court of equity can supply one requirement of a contract that is required by the statute of frauds to be in writing, it may supply another, and the logical conclusion would be that it might in the end supply all the requirements, and thereby contravene a positive statute. This cannot be done."

Another important case is Safe Deposit v. Diamond Coal Co., L. R. A. 1917 A 596 (Pa.). The supreme court of Pennsylvania reviews the American and English cases and holds that equity will not by the use of parol evidence reform, and cannot enforce as reformed, a contract made void by the statute of frauds.

"Where, however, the people speaking through the legislative branch of the government have declared that contracts relative to certain subjects shall possess certain requisites necessary to their validity, it is not within the power or the jurisdiction of a court of equity to annul or disregard the mandate. Equity corrects that wherein the law is deficient, but where the statutory law has spoken, equity must remain silent. * * * We are clear that upon reason and authority a court of equity cannot vary or rectify by parol an executory agreement in writing for the sale of lands, and as thus varied, in the absence of an estoppel, specifically enforce

performance of it. It is the doctrine of this court, declared in numerous cases, that, where a written agreement is varied by oral testimony, the whole contract in legal contemplation becomes parol. If there is anything settled in our law, that principle is firmly established. When, therefore, a party to an executory agreement in writing for the sale of lands succeeds in reforming it by oral testimony, he has reduced the whole agreement to a parol contract, and deprives himself of the right to have it specifically performed. He pulls down the house on his own head. When he converts the writing into an oral agreement, the statute declares it to 'be void.' He has rectified the written agreement, and in its place has established an agreement which in contemplation of law is parol, and therefore, by statutory mandate, absolutely invalid and without force. The true contract, as declared by the chancellor, cannot be enforced. 'It is then apparent,' says Judge Hare, 2 White & T. Lead. Cas. in Eq. 4th Am. ed. 494, 'that the contract as it stands is not the true one, and that the true contract is invalidated by the statute, and as the former ought not to be, and the latter cannot be, enforced, there is no room for a decree of specific performance.' "

PART PERFORMANCE

Obviously, there can be no recovery on a broker's contract for commission unless the broker performs his contract. However, because Vance Lumber Company wrote to Miss Gaunt on August 15, 1923 (Ex. 5, Tr. 117)—"As we are giving an option on the property that we offered for sale, please do not do anything further with this until you hear from us

again," we now discuss whether Miss Gaunt, up to that time, had procured a purchaser. All she had done was to mail a copy of the plat to Mark E. Reed, of Simpson Logging Company. He was a trustee of Mason County Logging Company and sent the plat to its president, Thomas Bordeaux. Bordeaux was already dealing for Mason County Logging Company to buy the property through W. H. Abel. The testimony is express on this point.

C. R. Bordeaux, secretary and manager of Mason County Logging Company, testified (Tr. 79):

> "The matter was first submitted to me, about buying these properties, something like a year and a half before we closed the deal. We never heard of Miss Ruby M. Gaunt in connection with finding the Mason County Logging Company as a buyer of this property, and never met the lady. * * * We were already dealing with Mr. Abel when the plat came in from Mr. Reed, and no attention was given to it as it furnished no information that we did not already have."

H. B. Dollar, secretary of Vance Lumber Company, testified (Tr. 60):

> "Vance Lumber Company had been negotiating with Mason County Logging Company, with reference to the purchase, for about a year and a half. Mr. Abel had had this up with the Vance Lumber Company about a year and a half before the option was given. Mr. Abel had been seen many times in connection with the giving of this option, during the year and a half. Miss Gaunt had nothing to do whatever with the se-

curing of the option which was given in August to Mason County Logging Company."

W. D. ABEL testified (Tr. 80):

"Some time in June, 1923, I went with my father (W. H. Abel) to the town of Bordeaux. He talked over at that time with Thomas Bordeaux concerning the sale of the Vance properties, in connection with which he had been working with them for some time. He showed to Mr. Bordeaux maps and plats, and they went over the topography showing the location of the Vance properties."

W. H. Abel testified (Tr. 71):

"I was connected with the sale of the lands of Vance Lumber Company to Mason County Logging Company from February, 1922, up to the time the sale was finally closed, as attorney for each party. I began negotiations for the sale of these properties to Mason County Logging Company on February 7, 1922. On that date, I wrote a letter to Mr. Bordeaux about giving an option."

The trial court properly found that Miss Gaunt did not procure Mason County Logging Company as a purchaser.

The Washington rule is that a broker's contract void under the statute of frauds, is not saved by performance, partial or complete.

In Keith v. Smith, 46 Wash. 131, it was said:

"The courts of the several states in which statutes of this character have been enacted

have constantly adhered to the rule that no action can be maintained for services performed in purchasing or selling real estate by an agent or broker, unless his contract of employment is in writing. This rule enforces the legislative intent evidenced by the enactment of such statutes. No other construction would do so. From its very nature a claim for commission could not be made until earned, and to hold that performance would take an action of this character out of the operation of the statute would nullify the statute itself."

In Cushing v. Monarch Timber Co., 75 Wash. 678, at page 687, the court said:

"Nor does the fact that the sale was actually made, even if it be conceded that it was made entirely through the efforts of the respondents, furnish any ground for recovery. Performance does not take the contract out of the statute of frauds.

" 'From its very nature a claim for commission could not be made until earned, and to hold that performance would take an action of this character out of the operation of the statute would nullify the statute itself.' Keith v. Smith, supra.

"For the same reason there can be no recovery upon the quantum meruit or upon an implied contract to pay for services rendered. Historically considered, all statutes of fraud are intended 'for the prevention of frauds and perjuries.' Craig v. Zelian, supra. To permit a recovery upon the quantum meruit or upon an implied contract would be to defeat the purpose of the statute and supply by implication a contract

which the statute expressly says may only be proven by written evidence."

UNRELATED WRITINGS

The unsigned plat was not attached to the letter on which suit is based. Neither of them made reference to the other and only by parol evidence are they connected.

27 C. J. 262 states the doctrine of related writings as it concerns the statute of frauds:

> "It is a general rule that the reference, relation or connection of the writings to or with each other, must appear on their face. The writings must contain either an express reference to each other or internal evidence of their unity, relation or connection."

12 Enc. Ev. 18 states:

> "The connection between the papers relied on must be made from the internal evidence they supply; * * * In order to show compliance with the statute by means of letters and other writings, these must all be signed by the party authorized to convey."

This rule has been applied by the supreme court of Washington in Broadway v. Decker, 47 Wash. 586, where the court quoted from 17 Cyc. 748e:

> "The rule that where a contract upon its face is incomplete resort may be had to parol evidence to supply the omitted stipulation applies only in cases unaffected by the statute of frauds. If the subject-matter of the contract is within

the statute of frauds and the contract or memorandum is deficient in some one or more of these essentials required by the statute, parol evidence cannot be received to supply the defects, for this would be to do the very thing prohibited by the statute."

In Gilman v. Brunton, 94 Wash. 5, the court said:

> The reference is not to an instrument containing a sufficient description, but merely declares the propery is 'the same property conveyed to the party of the first part (Brunton) by W. Tate and wife in 1912.' Parol evidence would be necessary to assist in determining what description was to be incorporated in the decree for specific performance. In Thompson v. English, 76 Wash. 23, in a case involving a somewhat similar description, this court said:
>
> " 'The description of the property as contained in the contract was, "Seventy-nine acres in Section 30, township 2 N., Range 3 E. W. M., Clarke Co., Wash. Owner, A. E. English." It will be observed that this description does not specify which 79 acres in section 30 was intended. To ascertain this fact, resort must be had to oral testimony. The description given cannot be applied to any definite property.' "

In Nance v. Valentine, 99 Wash. 325, where the court said:

> "It is contended by counsel for appellant that, under the pleadings and the evidence, this contract and the one between respondent and Blue for the exchange of lands should be read together to the end that the description in this contract be aided by the description in the exchange contract. This contract makes no refer-

> ence whatever to the exchange contract or to any other contract. That would be aiding the description by resorting to something to which this contract makes no reference whatever."

Thus parol evidence is not admissible to connect the unsigned plat with the signed letter, but if considered together, they do not comply with the statute of frauds. It was so hold in the state court, in the former litigation between the parties, upon similar evidence. The description is wholly insufficient.

SUMMARY

While mistake and fraud are alleged, not a witness testified in support of the charge. The case presented is one where the property was not described; the omission was intentional, and each side knew it to be such.

Gaunt did not procure Mason County Logging Company as a purchaser. It was already interested, had plats and information from another agent, when she mailed the plat to Mark E. Reed, of Simpson Logging Company. This other agent made the sale and collected the commission. Gaunt did not know Mason County Logging Company at all. She had never met Mark E. Reed, nor any officer of Mason County Logging Company.

Equity follows the law. This court will apply the local rule of property. Whenever the question has been presented in a federal court of equity, it has been decided that the court will follow the state stat-

ute of frauds. According to the Washington Statute and decisions there can be no recovery upon the contract sued on; nor can it be reformed by parol testimony- nor is it aided by part performance; nor can there be a recovery on **quantum meruit.**

While Miss Gaunt was putting the deal up to Anderson & Middleton Lumber Company, Vance Lumber Company was, through its agent and attorney, actively negotiating to sell the properties to Mason County Logging Company.

Miss Gaunt did not procure a purchaser; she was not the efficient cause of the sale. Indeed, she did participate therein. At most, she mailed a plat to a trustee of a concern already interested. At a later date, Mason County Logging Company obtained an option through no aid of hers. That option was allowed to expire, but thereafter negotiations were resumed and a sale made. Gaunt's case has no equity to support it.

The property was situate in the State of Washington. The parties to the contract lived there. She sued in the state court for $50,000 commission and was denied recovery. Later she took up her residence in Oregon and thereafter brought suit in equity to reform a void contract. During the period of three and one-half years, no suggestion was made that the contract, by mutual mistake, omitted description of the property. Not a witness testified that the omission was by mistake, mutual or otherwise.

The case is one where the agent claims a commission for making a sale to a buyer whom she never met, with whom she never had any correspondence, merely because she sent to a trustee of the buyer a map without description of the property to be submitted to another company, to-wit: Simpson Logging Company.

The decision and decree of Judge Neterer is supported by undisputed proofs and should be affirmed.

Respectfully submitted,

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